

82-1599
No.

Office-Supreme Court U.S.
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ALEXANDER L. STEVENS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF ST. LOUIS, etc., *et al.*,
Petitioners,

vs.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY,
etc., *et al.*, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit

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March, 1983

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QUESTIONS PRESENTED

1. Whether courts of appeals have jurisdiction under 42 U.S.C. §§1988 or 2000e-5 to grant or deny attorney's fees for services on appeal to a prevailing party in an employment discrimination case?
2. Whether courts of appeals, consonant with the standards of 42 U.S.C. §§1988 or 2000e-5, can summarily grant or deny attorney's fees for services on appeal to a prevailing party in an employment discrimination case?

PARTIES BELOW

The parties in the court of appeals were as follows:

Appellants - Firefighters Institute for Racial Equality, a corporation; George Baker; Robert D. Morgan; Robert Grady; Sherman George; George Redford Turner; Lawrence L. Britt; Vernon Ammons; Wendell H. Goins; Charles Gay; George E. Horne; William L. Young; Daniel S. Austin; Robert Anderson; John H. Harvey; Joseph P. Hughes; Eugene Staton; Preston Sims, each individually and on behalf of all other persons similarly situated.

Appellees - The City of St. Louis, Missouri, a municipal corporation; Division of Fire & Fire Prevention; Department of Public Safety, City of St. Louis, Missouri; Frank C. Cummings in his capacity as Acting Chairman of the Civil Service Commission of City of St. Louis, Missouri; Fred Gould, in his capacity as member of the Civil Service Commission, City of St. Louis, Missouri; Charles Marino, in his capacity as Director, Department of Public Safety, City of St. Louis, Missouri.

United States of America.

The City of St. Louis and its officers will be referred to as "petitioners"; respondents will be referred to as "FIRE" and "the United States" respectively.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions and Rule Involved	2
Statement of the Case	3
Reasons for Granting the Petition	5
I. The Petition Ought to Be Granted Because the Questions Presented Are Important Questions of Federal Practice and Procedure Concerning Attorney's Fees Which Must Be Settled by this Court.	6
II. The Petition Ought to Be Granted Because the Questions Presented Have Been Addressed Inconsistently by the Various Courts of Appeals and an Exercise of This Court's Power of Supervision Is Warranted.....	10
Conclusion	12

Appendix:

Appendix A	A-1
Appendix B	A-2
Appendix C	A-4
Appendix D	A-6
Appendix E	A-7
Appendix F	A-9
Appendix G	A-12
Appendix H	A-14
Appendix I	A-21

TABLE OF AUTHORITIES**Cases:**

Albemarle Paper Co. v. Moody , 422 U.S. 405 (1975)	6,9
Aware Woman Clinic v. City of Cocoa Beach , 629 F.2d 1146 (5th Cir. 1980)	10,11
Bond v. Stanton , 630 F.2d 1231 (7th Cir. 1980)	11
Christiansburg Garment Co. v. EEOC , 434 U.S. 412 (1978)	9,10
Consolidated Freightways Co. v. Kassel , 450 U.S. 1039, ____ U.S. ___, 102 S.Ct. 1496 (1981)	9,10
David v. Travisono , 621 F.2d 464 (1st Cir. 1980)	11

Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977), aff'd on other grounds, 437 U.S. 678 (1978).....	10
Glidden v. Zdanok, 370 U.S. 530 (1962).....	7
Gresham Park Community Organization v. Howell, 652 F.2d 1227 (5th Cir. 1981)	11
Hastings v. Maine-Endwell Central School Dist., 676 F. 2d 893 (2d Cir. 1982).....	10
Hughes v. Rowe, ____ U.S. ____, 101 S.Ct. 173 (1980) .	7
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)	7,10
Lane v. Mayor, City of Cheyenne, 620 F.2d 235 (10th Cir. 1980)	11
Liddell v. Bd. of Education, 667 F.2d 646 (8th Cir.), cert. denied sub nom. Caldwell v. State of Missouri, 454 U.S. 1081 (1981)	9
McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) ...	7
McManama v. Lukhard, 616 F.2d 727 (4th Cir. 1980) ..	11
Mitchell v. Maurer, 293 U.S. 237 (1934)	7
Mitchell v. Mid-Continent Spring Co., 583 F.2d 275 (6th Cir. 1978)	7
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	6,10
Northcross v. Bd. of Ed. of Memphis, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980)	8,11

Obin v. District No. 9, I.A.M. , 651 F.2d 574 (8th Cir. 1981)	7
Perkins v. Standard Oil Co. , 399 U.S. 222 (1970)	8,11
Prandini v. National Tea Co. , 557 F.2d 1015 (3d Cir. 1978)	7
Suzuki v. Yuen , 678 F.2d 761 (9th Cir. 1982)	10
White v. New Hampshire Dept. of Employment Security , ____ U.S. ___, 102 S.Ct. 1162 (1982)	6,7,10
Vasquez v. Fleming , 617 F.2d 334 (3d Cir. 1980)	10
Verzosa v. Merrill Lynch, etc. , 589 F.2d 974 (9th Cir. 1978)	11

Statutes and Rules:

28 U.S.C. §1254(1)	2
28 U.S.C. §1291	7
28 U.S.C. §1292	7
28 U.S.C. §1651	7
28 U.S.C. §2101	2
28 U.S.C. §2412	11
42 U.S.C. §1981	3
42 U.S.C. §1983	3
42 U.S.C. §1988	2,6,7,8,9,10,11

42 U.S.C. §2000e-5	i
42 U.S.C. §2000-5(j)	2,7
42 U.S.C. §2000-5(k)	2,6,8,9,11
Rule 17, 8th Cir. Local Rules	3,5,7,9,10
Rule 14(g), 9th Cir. Local Rules	11
Supreme Court Rule 17.1(a)	10
Supreme Court Rule 17.1(c)	10
Rule 39, F.R.A.P.	7
 Other Authorities:	
110 Cong.Rec. 6534, 12724, 13668, 14214 (1964)	7
Senate Report No. 94-1011, 5 U.S. Code, Cong. & Ad- min. News 5908 (94th Cong. 1976)	7
15 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure §3901 (1976)	7

No.

IN THE

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CITY OF ST. LOUIS, etc., *et al.*,
Petitioners,

vs.

FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY,
etc., *et al.*, and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit

Come now the City of St. Louis and certain of its officers, petitioners herein, and respectfully pray that a writ of certiorari be issued to review the judgment and order of the United States Court of Appeals for the Eighth Circuit entered in this case on February 8, 1983.

OPINIONS BELOW

The orders and opinions of the district court and the court of appeals giving rise to this petition are not reported and are reproduced in appendices A - E. Other opinions in the long history of this case are reported at 410 F.Supp. 948, amended, 418 F.Supp. 383, rev'd in part, 549 F.2d 506, cert. denied, 434 U.S. 819, appeal after remand, 588 F.2d 235, cert. denied, 443 U.S. 904, on remand, 470 F.Supp. 1281, vacated, 616 F.2d 350, cert. denied, 452 U.S. 938.

JURISDICTION

The judgment of the court of appeals affirming the district court on the merits was entered December 28, 1982; the order and judgment denying attorney's fees to petitioners was entered February 8, 1983. No petition for rehearing was filed. This petition is filed within ninety days after December 28, 1982 or February 8, 1983. 28 U.S.C. §2101. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(j) and (k), provides as follows:

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The Civil Rights Attorney's Fees Award Act, 42 U.S.C. §1988, provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rule 17, 8th Cir. Local Rules, provides:

Rule 17: Attorney's Fees

(a) In any case in which attorney's fees are recoverable under the law applicable to that case, a motion for attorney's fees shall be filed with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to an allowance of fees must be filed within 10 days after service on the party against whom the award of attorney's fees is sought.

(b) On the court's own motion or at the request of the prevailing party, a motion for attorney's fees on appeal may be remanded to the district court or administrative agency for appropriate hearing and determination.

(c) On its own motion the court may grant an allowance of reasonable attorney's fees to a prevailing party in appropriate cases.

(d) The clerk shall prepare and certify an award of attorney's fees granted by the court for insertion in the mandate. The issuance of the mandate shall not be delayed for an award of attorney's fees. If the mandate has been issued before final determination of a motion for an award of attorney's fees, the award, and any amendments thereto, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

STATEMENT OF THE CASE

This litigation involves two suits brought initially in 1974 under Title VII and 42 U.S.C. §§1981 and 1983, alleging that petitioners had engaged in a pattern of discrimination against blacks in hiring and promotion in the St. Louis Fire Department. The prior history of the litigation is set out in the opinions of the court of appeals, 549 F.2d 506 (8th Cir. 1977); 588 F.2d 235 (8th Cir. 1978); and 616 F.2d 350 (8th Cir. 1980). A fourth

appeal was decided in 1981, the opinion being unpublished. No. 80-1934 (8th Cir. 1981).

The court of appeals, in its 1980 opinion, 616 F.2d 350, held that a fire captain selection procedure used by petitioners had an adverse impact on blacks and had not been shown to be job-related. As an interim procedure and to make up for the absence of blacks in the first promotions from the challenged examination, the court directed that the City promote immediately to the rank of captain the eight blacks who scored highest on the assessment center, which it held was the most job related portion of the examination. Subsequent promotions, up to a total of sixty promotions, were to be made on a ratio of one black for each two whites. 616 F.2d 350, 364.

The mandate was filed in the district court on April 29, 1980. The uncontradicted evidence of record is that on May 6 and 7, 1980, counsel for petitioners contacted counsel for the United States and the private plaintiffs (FIRE, et al.) and indicated that the Fire Department would pass over Albert Bell, the black firefighter who ranked eighth on the assessment center. The reason given by the City for passing over Mr. Bell, who had received a suspension on April 25, 1980, was his disciplinary record. In May, 1980, the City promoted forty persons to the rank of fire captain in accordance with the mandate of the court of appeals. These included 19 black firefighters, eight of whom were given effective promotion dates of April 30, 1979.

After motion of the United States, filed May 19, 1980, the district court entered an order on June 17, 1980 implementing the mandate of the court of appeals, and providing *inter alia*, that petitioners promote "those eight blacks receiving the highest scores on the Assessment Center portion of the 1979 Fire Captain examination, if otherwise still qualified for promotion". No objection to that Order, or to any aspect of the City's prior implementation of the Order (e.g., the passing over of Albert Bell) was filed by the respondents FIRE, et al.

On March 15, 1982, FIRE filed a motion for contempt and execution of judgment alleging that the City improperly delayed the promotion of Albert Bell and denied him backpay and seniority by passing him over for another black candidate in May 1980; and that the City was in violation of the order requiring one black promoted for each two whites. Appendix F. By that time, the City had promoted, in addition to the eight blacks receiving retroactive appointments, 45 persons, including fifteen blacks.

The district court denied FIRE's original motion after conferring with counsel on May 19, 1982. Appendix D. FIRE filed a motion for rehearing on July 8, 1982, alleging no new facts. Appendix G. Another hearing was scheduled, at which the parties presented stipulated facts. Appendix H. At the time of the motion for rehearing, the City had promoted 48 persons, of whom sixteen were black. On August 11, 1982, the district court again denied the motion for contempt. Appendix C. FIRE appealed; the court of appeals summarily affirmed. Appendix B.

Because the record indicated beyond doubt that the petitioners had fully complied with applicable court orders, petitioners moved the court of appeals for an award of attorney's fees for services on appeal, in conformity to 8th Cir. Rule 17. Appendix I. The court of appeals denied the motion without comment or explanation. Appendix A.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE PETITION OUGHT TO BE GRANTED BECAUSE THE QUESTIONS PRESENTED ARE IMPORTANT QUES- TIONS OF FEDERAL PRACTICE AND PROCEDURE CONCERNING ATTORNEY'S FEES WHICH MUST BE SETTLED BY THIS COURT.

Although the amount of money at issue in the instant case is insignificant, the questions raised by the proceedings below are important and recurring. This Court has had occasion to wrestle with many questions involving attorney's fees under the Civil Rights Act of 1964, see, e.g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and under 42 U.S.C. §1988, see, e.g., *White v. New Hampshire Dept. of Employment Security*, ____ U.S. ___, 102 S.Ct. 1162 (1982). However, the Court has not yet addressed the proper role of the courts of appeals in granting attorney's fees for services on appeal under 42 U.S.C. §§1988 and 2000e-5(k). Petitioners submit that the time to do so has come.

The critical question, of course, is whether the courts of appeals enjoy any jurisdiction to pass upon motions for attorney's fees for appellate services, as an original matter, at all.¹ The statutes in question, §1988 and §2000e-5(k), both refer only to "the court". The sparse legislative history strongly suggests that

¹ This question was not raised by petitioners in the court of appeals, but this does not affect this petition, for two reasons: (1) Rule 17, 8th Cir. Local Rules, clearly indicates that the court of appeals considered that it had jurisdiction concerning fees, so that any attempt to raise the issue below would have been futile; and (more importantly) (2) the question is a jurisdictional question, and it is fundamental that such questions can be raised at any time. See, e.g., *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963); *Mitchell v. Maurer*, 293 U.S. 237 (1934); cf. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

Congress had in mind only the district courts in enacting these attorney's fees provisions. See 110 Cong.Rec. 6534, 12724, 13668, 14214 (1964); Senate Report No. 94-1011, 5 U.S. Code, Cong. & Admin. News 5908 (94th Cong. 1976). The idea that the courts of appeals could rule, as an original matter, on motions for attorney's fees is at odds with the provisions of 42 U.S.C. §2000e-5(j), which does nothing to enlarge appellate jurisdiction defined by 28 U.S.C. §§1291 and 1292.

It is axiomatic that the courts of appeals are courts of limited jurisdiction. See generally, 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3901 (1976). Their jurisdictional grants are found, in general, in 28 U.S.C. §§1291, 1292 and 1651. Nothing in any of these statutes confers jurisdiction on the courts of appeals to entertain and pass upon applications for attorney's fees. As this Court recently recognized in *White v. New Hampshire Dept. of Employment Security*, *supra*, a request for attorney's fees raises issues collateral to the main cause of action. Fees for services on appeal (as with fees for services in the district courts) are not merely "costs" under Rule 39, F.R.A.P. Such fee requests require an inquiry separate from the decisions on the merits, and their award is uniquely separable from the issues to be decided on appeal. Cf. *White, supra*, 102 S.Ct. 1166; *Obin v. District No. 9, I.A.M.*, 651 F.2d 574 (8th Cir. 1981). Grant or denial of fees nearly always requires an evidentiary hearing and factual findings, see, e.g., *Mitchell v. Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), cert. denied, 441 U.S. 972 (1979); *Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1978); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The appellate courts are ill-equipped to undertake the inquiry into the issue of attorney's fees. As Justice REHNQUIST has noted in another context, "The decision whether to award attorney's fees under 42 U.S.C. §1988 is committed to the discretion of the district courts, who are intimately familiar with the course of the litigation." *Hughes v. Rowe*, ____ U.S. ___, 101 S.Ct. 173,

183 (1980) (dissenting opinion). Petitioners submit that this statement is correct as a matter of law, and should be adopted by this Court to preclude disposition of fee requests by courts of appeals.

Doubtless it will be argued that recognition of appellate jurisdiction in the matter of fees for services on appeal under §§1988 and 2000e-5(k) is required by considerations of judicial economy. To be sure, there is a risk that an endless circle of remands and appeals could be generated by the appellate courts' inability to address appellate fee questions. The short answer to this problem is that it is for Congress to prescribe appellate jurisdiction, and the problem can only be addressed by Congress. However, careful consideration leads one to conclude that the risk is trivial that determined, disgruntled litigants, aided by unethical counsel, will initiate endless series of remands and appeals on appellate fee issues. Indeed, in the case at bar, there has been one instance in which the court of appeals did not address attorney's fees on appeal, and the matter was resolved by the district court on remand without further ado - even though this case has been protracted and hard fought in the extreme.

In sum, the courts of appeals simply do not possess jurisdiction and are not equipped to hear and determine applications for attorney's fees for services on appeal under 42 U.S.C. §§1988 and 2000e-5(k). The only course open when fees are to be awarded for services on appeal is to remand the case to the district court. See, e.g., *Northcross v. Bd. of Ed. of Memphis*, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); cf. *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970). Certiorari should therefore be granted in this case to correct the judgment of the court of appeals.

Assuming that the courts of appeals do enjoy jurisdiction to grant fees for appellate services under 42 U.S.C. §§1988 and 2000e-5(k), the serious question remains of how that jurisdic-

tion shall be exercised. Rule 17, 8th Cir. Local Rules, is a paradigm of the procedure in that court of appeals: sometimes fees are granted summarily by the court of appeals itself, with or without evidentiary materials, see, e.g., 588 F.2d 235, 243; sometimes fees are denied summarily, with or without evidentiary materials, see, in addition to the instant case, *Liddell v. Bd. of Education*, 667 F.2d 646 (8th Cir.), cert. denied sub nom. *Caldwell v. State of Missouri*, 454 U.S. 1081 (1981); *Consolidated Freightways Co. v. Kassel*, 450 U.S. 1039, ____ U.S. ___, 102 S.Ct. 1496 (1982) (cert. dismissed as improvidently granted). There is reason to believe that the practice in other circuits is nearly as confused as that in the Eighth Circuit. Clearly this situation should not continue.

Assuming that §§1988 and 2000e-5(k) confer jurisdiction and discretion on the courts of appeals to make any awards of fees, surely the statutes did not confer such discretion unfettered by meaningful standards. In a related context, this Court has noted that invocation of judicial discretion by Congress requires a "principled application of standards" consistent with statutory purposes and not "equity [which] varies like the Chancellor's foot.' " *Albermarle Paper Co. v. Moody*, *supra*, 422 U.S. 417.

Eighth Circuit Rule 17 exemplifies the inability of appellate courts to deal adequately with fee applications, and the need for remand of such issues to the district court. Nevertheless, assuming the appellate courts can and should deal with such matters in the first instance, Rule 17 does not comport with the standards which ordinarily govern fee proceedings under §§1988 and 2000e-5(k). The manner in which the court of appeals has dealt with the fee application in this and other cases, though in accord with its Rule 17, does not demonstrate a "principled application of standards"; rather, it smacks of caprice. At a minimum, litigants - especially defendants who prevail on appeal, who are subject to a different fee-award standard than plaintiffs, see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), are

entitled to a reasoned explanation of a denial of fees; and appellate courts should not award fees *sua sponte*, without factual predicate. Cf. *Johnson v. Georgia Highway Express, Inc.*, *supra*. Obviously, only this Court is in a position to provide definite guidance to the courts of appeals in this regard,² as the Court has done for the district courts, e.g., *White v. New Hampshire Dept. of Employment Security*, *supra*; *Christiansburg Garment Co. v. EEOC*, *supra*; *Newman v. Piggle Park Enterprises, Inc.*, *supra*. Certiorari should issue to address these important questions of federal practice and procedure. Cf. Supreme Court Rule 17.1(a) and (c).

II. THE PETITION OUGHT TO BE GRANTED BECAUSE THE QUESTIONS PRESENTED HAVE BEEN ADDRESSED INCONSISTENTLY BY THE VARIOUS COURTS OF APPEALS AND AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS WARRANTED.

As noted above, Eighth Circuit Rule 17 epitomizes the haphazard approach to appellate fee awards obtaining in nearly all the circuits. The Third, Fifth, and Ninth Circuits have apparently addressed the jurisdictional question and have held that the courts of appeals do have jurisdiction to grant or deny fees, at least under 42 U.S.C. §1988. See *Vasquez v. Fleming*, 617 F.2d 334 (3d Cir. 1980); *Aware Woman Clinic v. City of Cocoa Beach*, 629 F.2d 1146 (5th Cir. 1980); *Suzuki v. Yuen*, 678 F.2d 761 (9th Cir. 1982). The Eighth Circuit belongs to this company. *Finney v. Hutto*, 548 F.2d 740, 743 (8th Cir. 1977), aff'd on other grounds, 437 U.S. 678 (1978). The First, Second, Fourth, Sixth, Seventh and Tenth Circuits apparently view the discretion to award attorney's fees, including fees for services on appeal, to be vested by statute in the district courts, and ac-

² Summary denial of attorney's fees to prevailing parties has troubled this Court before, although the Court eventually chose not to address the matter. *Consolidated Freightways v. Kassel*, *supra*.

cordingly these courts of appeals regularly remand fee questions. See *David v. Trivisono*, 621 F.2d 464 (1st Cir. 1980); *Hastings v. Maine-Endwell Central School Dist.*, 676 F.2d 893 (2d Cir. 1982); *McManama v. Lukhard*, 616 F.2d 727 (4th Cir. 1980); *Northcross v. Bd. of Ed. of Memphis, supra*; *Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980); *Lane v. Mayor, City of Cheyenne*, 620 F.2d 235 (10th Cir. 1980).

Like the court of appeals in the instant case, those courts which have expressed the view that appellate fees can be awarded by the appellate courts are not consistent in their approach. Summary awards, summary denials, and remands to the district court to determine appellate fees have been seen in these circuits, although no other circuit has gone so far as to codify this catch-as-catch-can approach in a local rule.³ See, e.g., *Aware Woman Clinic v. City of Cocoa Beach, supra*; *Gresham Park Community Organization v. Howell*, 652 F.2d 1227 (5th Cir. 1981); *Verzosa v. Merrill Lynch, etc.*, 589 F.2d 974 (9th Cir. 1978).

This Court has itself indicated a preference for determination of attorney's fees questions by the district courts. *Perkins v. Standard Oil Co., supra*. Considerations of fairness, judicial economy and jurisdiction demand that this Court define the role of appellate courts in deciding applications for appellate fees under §§1988 and 2000e-5(k) and provide uniform guidelines to be followed in the event appellate courts do have the jurisdiction to grant or deny such fees in the first instance. Accordingly, certiorari should issue in this case.

³ The Ninth Circuit provides, Local Rule 14(g), for filing of applications for fees on appeal, but the rule does not resemble that in the Eighth Circuit. Some circuits have adopted rules applicable to the Equal Access to Justice Act, 28 U.S.C. §2412.

CONCLUSION

For the foregoing reasons, certiorari should issue to review and correct the decision below, preferably by ultimately vacating the order of the court of appeals with instructions to remand the issue of fees to the district court.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

	Page
Appendix A	A-1
Appendix B	A-2
Appendix C	A-4
Appendix D	A-6
Appendix E	A-7
Appendix F	A-9
Appendix G	A-12
Appendix H	A-14
Appendix I	A-21

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

September Term, 1982

No. 82-2093

**Firefighters Institute for Racial Equality, etc., et al.,
Appellants,**

vs.

**The City of St. Louis, Missouri, etc., et al.,
Appellees.**

**Appeal from the United States District Court
for the Eastern District of Missouri**

**It is now here ordered by the Court that appellees will recover
the sum of \$23.10 for the costs of reproducing briefs from ap-
pellants.**

**It is further ordered that appellees' motion for attorneys' fees
is denied by the Court.**

February 8, 1983

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 82-2093

Firefighters Institute for Racial Equality, a corporation;
George Baker; Robert D. Morgan; Robert Grady;
Sherman George; George Redford Turner; Lawrence L. Britt;
Vernon Ammons; Wendell H. Goins; Charles Gay; George E.
Horne; William L. Young; Daniel S. Austin; Robert Anderson;
John H. Harvey; Joseph P. Hughes; Eugene Stanton;
Preston Sims, each individually and on behalf of all other
persons similarly situated,

Appellants,

v.

The City of St. Louis, Missouri, a municipal corporation;
Division of Fire & Fire Prevention; Department of Public
Safety, City of St. Louis, Missouri; Frank C. Cummings in his
capacity as Acting Chairman of the Civil Service Commission
of City of St. Louis, Missouri; Fred Gould, in his capacity
as a member of the Civil Service Commission, City of St. Louis,
Missouri; Charles Marino, in his capacity as Director,
Department of Public Safety, City of St. Louis, Missouri,

Appellees.

**Appeal from the United States District Court
for the Eastern District of Missouri**

Filed: December 28, 1982

Before HEANEY, ROSS and FAGG, Circuit Judges.

Order

The Firefighters Institute for Racial Equality appeals from an order of the district court refusing to hold the City of St. Louis in contempt for allegedly refusing to comply with this Court's mandate regarding promotions to the rank of fire captain in the St. Louis Fire Department. *See Firefighters Institute, etc. v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981).

After a careful review of the briefs and record, we affirm the judgment of the district court; it is based on findings of fact which are not clearly erroneous and no error of law appears. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

1/21/83

APPENDIX C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 74 - 30 C (2)

**Firefighters Institute for Racial Equality, et al.,
Plaintiffs,
vs.
City of St. Louis, Missouri, et al.,
Defendants.**

No. 74 - 200 C (2)

**United States of America,
Plaintiff,
vs.
City of St. Louis, et al.,
Defendants.**

**Order
(Filed August 12, 1982)**

Based upon the hearing in this Court on August 11, 1982, the stipulation of the parties filed here, and the statements of counsel,

IT IS HEREBY ORDERED that the motion of the defendant City of St. Louis to modify this Court's Order dated February 24, 1982 be and is denied as moot.

— A-5 —

IT IS FURTHER ORDERED that the motion of the plaintiff F.I.R.E. for an order of contempt and execution of judgment be and is denied.

/s/ **John F. Nangle**
UNITED STATES DISTRICT
JUDGE

Dated: August 12, 1982.

APPENDIX D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 74 - 30 C (2)

No. 74 - 200 C (2)

**F.I.R.E., et al.,
Plaintiffs,**

vs.

**City of St. Louis, et al.,
Defendants.**

Order

(Filed May 24, 1982)

IT IS HEREBY ORDERED that the motion of the plaintiffs for an order of contempt and execution of judgment be and is denied pursuant to the record made in open court on May 19, 1982.

**/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE**

Dated: May 24, 1982.

APPENDIX E

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 74 C 30 (2)

Firefighters Institute for Racial Equality, et al.,
Plaintiffs,

vs.

City of St. Louis, Missouri, et al.,
Defendants.

No. 74 C 200 (2)

United States of America,
Plaintiff,

vs.

City of St. Louis, et al.,
Defendants.

Order

(Filed June 17, 1980)

Pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, and upon motions of the parties,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. Defendants City of St. Louis, et al. shall immediately appoint to the position of Fire Captain those eight black firefighters who received the highest scores on the assessment

center portion of the 1979 Fire Captain examination and are otherwise still qualified. These persons shall have seniority, and shall receive all benefits, including back pay and fringe benefits, due and owing them as if they had been appointed to the rank of Fire Captain on April 30, 1979.

2. Defendants City of St. Louis, et al. shall fill all existing and future vacancies, up to a maximum of sixty (60), on the basis of one black appointment for each two white appointments. The determination of whether vacancies exist shall be made by the defendant City of St. Louis. For purposes of making these appointments, the remaining black and white candidates who completed the assessment center portion of the 1979 Fire Captain examination, if otherwise still qualified, shall be ranked separately by race on the basis of their score on the assessment center, and appointments made in order of their ranks on those lists.
3. If the defendant City of St. Louis or the Intervenors wish to present additional evidence relating to the validity of the 1979 Fire Captain examination, they shall present to the Court and to all parties, within twenty days of this date, a detailed outline of such evidence, including a summary of all evidence, copies of reports of experts, copies of exhibits, and memorandum of law on the issues raised by the additional evidence. All parties shall have twenty days in which to respond, after which time this Court will rule on whether additional evidence will be accepted.
4. A hearing be and is set for June 23, 1980 at 9:30 a.m., or as soon thereafter as this matter may be heard, on plaintiff's request for attorneys' fees.

/s/ John F. Nangle
UNITED STATES DISTRICT
JUDGE

Dated: June 17, 1980.

APPENDIX F

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

Cause No. 74 C 30 (2)

**Firefighters Institute for Racial Equality, et al.,
Plaintiffs,**

vs.

**City of St. Louis, Missouri, et al.,
Defendants.**

Cause No. 74-200 C (2)

**United States of America,
Plaintiff,**

vs.

**City of St. Louis, et al.,
Defendant.**

Motion For Order Of Contempt And Execution Of Judgment

Comes now Plaintiffs, Firefighters Institute for Racial Equality, et al, (F.I.R.E.) and for its motion for order of contempt and execution of judgment states:

1. That plaintiff F.I.R.E. motions the court on behalf of its collective membership and specifically on behalf of Albert Bell and Raymond Henderson, black firefighters who are aggrieved by defendant City's failure to follow the directives of the United States Court of Appeals, 8th Circuit decision as reported at 616 F.2d 350.

2. That on or about January 17, 1980, judgment was rendered by the United States Court of Appeals, 8th Circuit, (616 F.2d 350, 364) wherein, *inter alia*, the Court of Appeals ordered the District Court to "order the City of St. Louis to properly appoint to the position of fire captain those eight black firefighters who received the highest scores on the assessment center portion of the examination, with effective promotion dates of April 30, 1979." The City was to further "fill the first additional 30 vacancies as they occur. St. Louis must fill these vacancies on the basis of one black firefighter for each two white firefighters that are promoted to the position of fire captain."
3. That in the case of Albert Bell, a black firefighter who scored among the top eight black firefighters as denominated in the Court's opinion aforementioned, he was arbitrarily and capriciously passed over for promotion and another black firefighter with a lower score than his was substituted for Bell and promoted effective April 30, 1979, with benefits and seniority as per the Court's opinion in this cause.
4. That Albert Bell was subsequently promoted to the rank of captain effective November 2, 1980, but was denied the benefits and seniority as per the Court's opinion in this cause.
5. That Albert Bell has suffered substantial loss of income and seniority by the failure of the City of St. Louis to promote him in accord with the Court's opinion as aforementioned.
6. That in the case of Raymond Henderson, a black firefighter, he was scheduled to be promoted in October, 1981 when he was certified as eligible for promotion by defendant's Department of Personnel. According to the captain's eligibility list as of January, 1980. (Plaintiff's exhibit A attached hereto) Henderson should have been promoted in accord with the Court of Appeals order requiring the promotion of one black firefighter for each two white firefighters (F.I.R.E. VS. CITY, 616 F.2d 350, 364). However, he was passed over in order that

another firefighter by the name of Ken Danley could be promoted and be allowed to retire as an officer.

7. That Raymond Henderson was caused to suffer and does suffer substantial and irreparable harm that can only be remedied by his immediate promotion to the rank of captain with attendant back pay and seniority.

/s/ Albert J. Bell

/s/ Raymond Henderson

STATE OF MISSOURI

SS

CITY OF ST. LOUIS

I, Charles E. Kirksey, Jr. a notary public, do hereby certify that on the 12th day of March, 1982, personally appeared before me, Albert Bell and Raymond Henderson, who being by me first duly sworn, declared that they are the persons who signed the foregoing document and that the statements therein contained are true.

/s/ CHARLES E. KIRKSEY, JR.
NOTARY PUBLIC

My commission expires

6-24-83

/s/ CHARLES E. KIRKSEY, JR.
BELL, HARRIS,
KIRKSEY & THOMAS
3920 Lindell Blvd.
St. Louis, MO 63108
533-1776

Attorneys for Plaintiffs

APPENDIX G

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 74-30C(2)

No. 74-200C(2)

F.I.R.E., et al.,

Plaintiffs,

vs.

City of St. Louis, et al.,

Defendants.

**Motion For Rehearing For Order Of Contempt
And Execution Of Judgment**

Come now Plaintiffs, Firefighter's Institute for Racial Equality (F.I.R.E.), et al and for his motion for rehearing states:

1. That on or about May 19, 1981 counsel for plaintiffs and representatives of the defendants appeared before Honorable John F. Nangle, District Judge, for an informal hearing on Plaintiffs' Motion for an Order of Contempt and Execution of Judgment filed on or about March 13, 1982.

2. That Plaintiffs are entitled to a rehearing on their original motion for the reason that the trial court failed to consider in the case of Albert Bell that the representations of counsel for Defendants were inconsequential in considered vis-a-vis the dictates of the United States Court of Appeals, Eighth Circuit decision as reported at 616 F2d 350 which provided the only framework for the administration of the promotion of black and white firefighters to the rank of captain.

3. That on or about May 26, 1982 counsel for Plaintiff, F.I.R.E., met personally with David Lang, former attorney for F.I.R.E., and questioned him relative to whether or not he made the statements alleged by counsels for defendants herein. Attorney Lang could not remember whether or not he had actually made such alleged statements but whether he did or not is of no consequence for if he had in fact made such statements he did so without authority either from Plaintiff, F.I.R.E., or from the Court of Appeals. In this counsel's reading of the decision rendered by the Court of Appeals, there is no provision for the modification or arbitrary and capricious alteration of the terms of what appears to be a very well though out opinion.

4. In the case of Raymond Henderson, the court has failed to properly interpret the language of the United States Court of Appeals, Eighth Circuit decision as reported at 616 F2d, 350, 364 which requires that one black firefighter shall be promoted to fill fire captain vacancies for each two white firefighters that are promoted. At present the City is in the posture of having promoted three white firefighters and has only promoted one black firefighter.

WHEREFORE, Plaintiffs pray this court reconsider its ruling of May 19, 1982 and rehear plaintiff's original Motion for Order of Contempt and Execution of Judgment.

Respectfully submitted,

BELL, HARRIS, KIRKSEY & THOMAS

/s/ CHARLES E. KIRKSEY, JR.

3920 Lindell

St. Louis, MO 63108

533-1776

Attorney for Plaintiff, F.I.R.E.

[JURAT OMITTED.]

APPENDIX H

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 74-30 C (2)

No. 74-200 C (2)

F.I.R.E., et al.,

Plaintiffs,

vs.

City of St. Louis, et al.,

Defendants.

**Stipulation Of Fact For
Purposes Of Motion For Contempt**

1. Albert Bell ranked number 8 on the assessment center list pursuant to which fire captain promotions were to be made under the mandate of the Court of Appeals.
2. Albert Bell was passed over for promotion by the City in May, 1980, notwithstanding his rank on the assessment center list.
3. If called to testify, Robert H. Dierker, Jr., counsel for the City, would testify that on May 6, 1980, he had a telephone conversation with Gerald George, counsel for the government, and on May 7, 1980, had a telephone conversation with David Lang, counsel for F.I.R.E., in which he informed Messrs George and Lang that the City intended to pass over Mr. Bell for promotion in May of 1980, on the ground that Mr. Bell's disciplinary record did not warrant his promotion.

4. Mr. Bell was promoted to the rank of fire captain on November 2, 1980.

5. If called to testify, Chief Kamprad would testify that he interviewed Mr. Bell in May, 1980, and advised Mr. Bell that he was being passed over for promotion and further advised him that if his record improved, he would be promoted at a later date.

6. If called, witnesses for the City would testify that the attached Exhibits A and B accurately reflect Albert Bell's disciplinary record and the record of his suspension ending May, 1980.

7. If called to testify, Albert Bell will testify that he was, in May, 1980, one of the top eight black firefighters on the assessment center portion of the test and that he was passed over a promotion due to representations by his supervisor that he was a disciplinary problem, and that he was subsequently promoted to the rank of fire captain on November 2, 1980. He will further testify that in July, 1980, he wrote Mr. Duffe of the City of St. Louis Personnel Department, a letter requesting a civil service hearing to contest the fact that he was passed over for promotion pursuant to the Eighth Circuit Court of Appeals' order respecting promotion of black firefighters within the City of St. Louis Fire Department. (Letter attached as Exhibit C hereto.)

8. The attached Exhibit D reflects all captains by race promoted since May, 1980 pursuant to orders of this Court, including date of their promotions.

9. Raymond Henderson was promoted to fire captain effective July 11, 1982.

[SIGNATURES OMITTED.]

[EXHIBITS A, B AND C TO THE STIPULATION,
CONCERNING THE DISCIPLINARY RECORD OF
ALBERT BELL, ARE OMITTED.]

EXHIBIT D

Captains Promoted May, 1980

Name	Race
1. McPherson, Wallace E.	B
2. Davis, John N.	B
3. Glover, Alvoyd D.	B
4. George, Roy R.	B
5. Wade, Larry E.	B
6. Bates, Charles H.	B
7. Sayless, Lawrence	B
8. Whitaker, Robert III	B
9. Cook, Jerome	B
10. Kahn, Wardell	B
11. Moore, Cornelius	B
12. Logan, Roland E.	B
13. Moore, Marcellars C.	B
14. McDaniels, Herschel J.	B
15. Jackson, Leroy	B
16. Jones Jr., William	B
17. Washington, Tuner G. Jr.	B
18. Hammond, Raymond E.	B
19. Grady, Robert	B
1. Ortbals, Ralph H.	W
2. Frericks, Leonard E.	W
3. Kobler, Ronald W.	W
4. Cassidy, Robert J.	W
5. Maquire, Charles M.	W
6. Gillman, Thomas C.	W
7. Pollihan, Roger D.	W
8. Lammert, Martin P.	W
9. Salamie, Ralph J.	W
10. Carden, Richard P.	W

11. Plumlee, Marion R.	W
12. Vail, John L.	W
13. Proctor, Charles W.	W
14. Bohnerkamp, Richard T.	W
15. Brown, James L.	W
16. Pikesley, Donald F.	W
17. O'Neill, John J.	W
18. Schnur, Gary L.	W
19. Pollihan, Michael J.	W
20. Lindsay, Burual W.	W
21. Smith, James G.	W

Note: The First Eight Blacks Named Above Were Promoted
Effective April 30, 1979.

October 31, 1980

Mrs. Dorothy Whalen
Register, City of St. Louis
Room 206, City Hall

Dear Mrs. Whalen:

This is to inform you that the men listed below have been promoted to the rank of Fire Captain. The effective date is November 2, 1980 at the bi-weekly rate of \$851.89.

Please administer the official oath to them.

Sincerely,

/s/ Chas. Kamprad
Chief of the Department

Albert Bell*	6060 North Pointe	63147
Frank Schaper	6957 Hillsland	63109

Harland Cupp	3725	Primm	63123
Ronald Bell*	5673	Cates	63112
George Hunt	5725	Milentz	63109
Gerald Noel	4918	Eichelberger	63109

CRK/iam

STOP FIRES BEFORE THEY START

*** = BLACK**

November 26, 1980

**Mrs. Dorothy Whalen
Register, City of St. Louis
Room 206, City Hall**

Dear Mrs. Whalen:

This is to inform you that the men listed below have been promoted to the rank of Fire Captain. The effective date is November 30, 1980 at the bi-weekly rate of \$851.89.

Please administer the official oath to them.

Sincerely,

**Chas. Kamprad
Fire Chief**

Jesse Terrell*	4728	Wren	63120
Charles Moser	6531	Wise	63139
David Hodge	601	Loga	63147

CK/bb

March 6, 1981

**Mrs. Dorothy Whalen
Register, City of St. Louis
Room 206, City Hall**

Dear Mrs. Whalen:

This is to inform you that the men listed below have been promoted to the rank of Fire Captain. The bi-weekly rate is \$851.89.

Please administer the Official oath to them.

Sincerely,

**Chas. Kamprad,
Fire Chief**

William Conley	4656 Varrelmann 63116	Effective 3-8-81
Harvey S. Weber*	8624 Riverview 63147	Effective 3-8-81
James R. Lorentz	7366 Sharp 63116	Effective 5-3-81

CRK/iam

October 28, 1981

**Mrs. Vera Braddy
Register, City of St. Louis
Room 209, City Hall**

Dear Mrs. Braddy:

This is to inform you that Mr. Richard D. Shaw, 5633 Botanical, St. Louis, Missouri 63110, has been promoted to the rank of Fire Captain effective November 1, 1981. The bi-weekly rate is \$945.60.

Please administer the official oath.

Sincerely,

Chas. Kamprad
Fire Chief

CRK/iam

July 2, 1982

Mrs. Vera Braddy
Register, City of St. Louis
Room 118, City Hall

Dear Mrs. Braddy:

This is to inform you that the men listed below have been promoted to the rank of Fire Captain effective July 11, 1982. The bi-weekly rate is \$945.60.

Please administer the official oath to them.

Sincerely,

Chas. Kamprad,
Fire Chief

Kenneth B. Danley	4514 Tholozan	63116
Raymond Henderson, Jr.*	5946 Floy	63147
John H. Pursley	6935 Lansdowne	63109

APPENDIX I

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 81-1934

Firefighters Institute for Racial Equality, etc., et al.,
Appellants,

vs.

City of St. Louis, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Motion For Award Of Attorneys' Fees

Pursuant to 8th Circuit Rule 17, and 42 U.S.C. §1988, appellee City of St. Louis moves the Court to allow reasonable attorneys' fees to the City of St. Louis for time expended in the preparation and filing of the record and brief in the above-referenced case.

In support of this motion, appellee City states that an award of fees is appropriate under the standards set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The appeal in the instant case was clearly unreasonable and without foundation, and amounted to little more than harassment of the City and the District Court. Unless the Court wishes to countenance such tactics on the part of appellants in the future, an award of attorneys' fees is eminently just and reasonable.

WHEREFORE, appellee City prays that the Court enter its order awarding said appellee attorneys' fees in the sum of \$315.00.

Attached hereto are affidavits of counsel of record for appellee City.

JAMES J. WILSON, CITY COUNSELOR

By: /s/ Thomas J. Ray
Associate City Counselor

/s/ Robert H. Dierker, Jr.
Associate City Counselor
314 City Hall
St. Louis, Mo. 63103
622-3361
Attorneys for City of St. Louis

[CERTIFICATE OF SERVICE OMITTED.]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1934

Firefighters Institute for Racial Equality, etc., et al.,
Appellants,

vs.

City of St. Louis, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

**Affidavit Of Robert H. Dierker, Jr,
In Support Of Award Of Attorneys'
Fees To Appellee City Of St. Louis**

Robert H. Dierker, Jr., being first duly sworn, upon his oath does depose and says as follows:

1. I am an Associate City Counselor of the City of St. Louis, a member of the bar of this Court since 1975 and a member of the Missouri Bar since 1974. I am counsel of record for the City of St. Louis, appellee in the above-captioned action.

2. The aggregate time I spent in regard to the above-captioned case to date is 4 hours. The breakdown of the time on a daily basis is as follows:

Date	Time Spent (Hours)	Description of Work
10/28/82	.5	Review brief filed by appellants; confer with Tom Ray
11/12/82	2.0	Research and drafting of brief of appellee City
11/15/82	1.0	Review and finalize brief
12/30/82	.5	Preparation and filing of motion for attorneys' fees

3. I am an experienced federal practitioner, having tried or participated in the trial of numerous federal civil rights actions, dealing with claims of employment discrimination. I also have considerable experience in the defense of damage actions in federal and state court, other than civil rights actions.

4. Based on past professional associations, I am familiar with the fees prevailing in the St. Louis metropolitan area for representation of clients in major federal litigation. Based on my knowledge, I respectfully suggest to the Court that a range

of \$70 - \$80 per hour is a reasonable charge for time expended in the defense of my clients in this case.

In Witness Whereof, I have hereunto set my hand this 3 day of January, 1983.

/s/ Robert H. Dierker, Jr.

[JURAT OMITTED.]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1934

Firefighters Institute for Racial Equality, etc., et al.,
Appellants,

vs.

City of St. Louis, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

**Affidavit Of Thomas J. Ray
In Support Of Award Of Attorneys'
Fees To Appellee City Of St. Louis**

Thomas J. Ray, being first duly sworn, upon his oath does depose and says as follows:

1. I am an Associate City Counselor of the City of St. Louis, a member of the bar of this Court and of Missouri since 1975. I am counsel of record for the City of St. Louis, appellee in the above-captioned action.

2. The aggregate time I spent in regard to the above-captioned case to date is 1/2 hour. The breakdown of the time on a daily basis is as follows:

Date	Time Spent (Hours)	Description of Work
10/28/82	.25	Review brief filed by appellants;
11/15/82	.25	Review brief filed by City

3. I am an experienced federal practitioner, having tried or participated in the trial of numerous federal civil rights actions, including claims of employment discrimination. I also have considerable experience in the defense of damage actions in federal and state court, other than civil rights actions.

4. Based on past professional associations, I am familiar with the fees prevailing in the St. Louis metropolitan area for representation of clients in major federal litigation. Based on my knowledge, I respectfully suggest to the Court that a range of \$70 - \$80 per hour is a reasonable charge for time expended in the defense of my clients in this case.

In Witness Whereof, I have hereunto set my hand this 3 day of January, 1983.

/s/ Thomas J. Ray

[JURAT OMITTED.]